# ARTICLES

# Segregation "Misunderstood": The *Milliken* Decision Revisited

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## *Introduction*

IN *MILLIKEN V. BRADLEY*,[1] the Supreme Court reversed an affirmative school desegregation order for the first time since the 1954 decision in *Brown v. Board of Education*.[2] By a five to four margin, the Court held that the district court was in error when it ordered fifty-three suburban school districts to participate in the desegregation of the predominantly black Detroit school district. The political implications of the decision were immediately apparent. The Court had sentenced northern school desegregation to the death penalty before the baby had taken its first full breath.[3] Metropolitan-wide relief was the last hope for the meaningful integration of schools in a nation whose urban/suburban demography was becoming increasingly segregated.[4] The *Milliken* decision not

1. 418 U.S. 717 (1974).

2. 347 U.S. 483 (1954). This 1954 decision, hereinafter referred to as *Brown*, declared the fundamental principle that racial discrimination in public education is unconstitutional. A second Supreme Court decision, 349 U.S. 294 (1955), hereinafter referred to as *Brown II*, set forth the principles and guidelines to be followed by lower courts in effectuating relief in desegregation cases.

3. Statistics indicate that "in the North and South public schools today are more racially segregated than they were in 1954, and the barriers to desegregation, for all practical purposes, are virtually insurmountable." SENATE SELECT COMM. ON EQUAL EDUCATION OPPORTUNITY, 92D CONG., 2D SESS., REPORT: TOWARD EQUAL EDUCATIONAL OPPORTUNITY 102-04 (Comm. Print 1972).

4. *See* Taylor, *Metropolitan-Wide Desegregation*, 11 INEQUALITY IN EDUC. 45 (1972). Recent statistics indicate that over two million black children attend schools in the nation's 20 largest urban school districts. An average of 60% of the school populations in these districts are minority group students, and 90% of them attend schools that are predominantly nonwhite. In the nation's five largest urban districts, the percentages of minority students are:

only assured middle-class whites that their mass exodus to the suburbs to seek refuge from blacks had not been made in vain,[5] but the Supreme Court also made clear that they would not use school desegregation to invade the suburban fortress of housing for whites only.[6]

The *Milliken* decision stands as a disturbing reflection of the changing political and social mood of the American public. In dissent, Justice Marshall, who had argued *Brown* before the Supreme Court twenty years earlier, closed his opinion with a ringing indictment of his colleagues in the majority:

> Today's holding, I fear, is more a reflection of a perceived mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.[7]

One is tempted to simply say "amen" to Justice Marshall's insightful analysis of the majority opinion as a myopic political accommodation to public mood. The immediate reaction of many critics of the Burger Court, including this author, was to write the opinion off as a not so facile rationalization of a politically expedient decision. But the opinion merits closer examination now that time

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New York, 66%; Los Angeles, 56%; Chicago, 71%; Philadelphia, 66%; and Detroit, 72%. In the next five largest districts (Houston, Baltimore, Dallas, Cleveland, and the District of Columbia), the minority school population averages 68%. Over 1.5 million minority children reside in these 10 districts. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, FALL 1972 AND FALL 1973 ELEMENTARY AND SECONDARY SCHOOL SURVEY PRESS RELEASE FORMAT REPORTS FOR 95 OF THE 100 LARGEST SCHOOL DISTRICTS (1973).

5. *See, e.g.*, Bell, *Running and Busing in Twentieth-Century America*, 4 J.L. & EDUC. 214 (1975). The fact that the *Milliken* decision has effectively insulated wealthier suburban whites from school desegregation has not gone unnoticed by urban working class whites whose resistance to intradistrict busing orders has been intensified by what they perceive as deferential treatment for their more affluent neighbors.

6. In James v. Valtierra, 402 U.S. 137 (1971), the Supreme Court insured the maintenance of residential segregation in the suburbs by upholding California Constitution art. XXXIV, a provision which required referendum approval of low-rent public housing and had the demonstrable impact of excluding racial minorities. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Warth v. Seldin, 422 U.S. 490 (1975). *But cf.* Hills v. Gautreaux, 425 U.S. 284 (1976) (where the Supreme Court distinguished *Milliken* on the basis of a court's limited equity jurisdiction and noted that since the defendant public housing agency (HUD) had violated the Constitution, and since HUD's authority encompassed the suburbs as well as the city of Chicago, it was therefore appropriate to order that integrated public housing be built in the suburbs.)

7. 418 U.S.at 814-15 (Marshall, J., dissenting).

has changed its status from news to well-established precedent.[8] It deserves a closer look not because Justice Marshall's fears of political motivation were unfounded, nor because people take Supreme Court opinions more seriously once they have been cited in subsequent cases, but because a closer look at the Chief Justice's opinion will reveal a reflection of perceived public mood which is even more disturbing than a momentary capitulation to modern-day antibusing forces.

The central inadequacy of the *Milliken* opinion was the Court's refusal to recognize the true nature of segregation as an institution in this country. The purpose of this article is (1) to explore just what the Supreme Court has "misunderstood"[9] or chosen not to articulate about the reality of segregation; (2) to demonstrate that the Court's misunderstanding results not from lack of evidence clarifying segregation's real meaning and import, but rather from a conscious decision to ignore the obvious meaning of that evidence; and (3) to demonstrate that once segregation is properly understood, the court's differing treatment of northern (*de facto*) and southern (*de jure*) school segregation is unsound and bears reexamination.

Part I of the article begins with a brief recapitulation of the *Milliken* opinion itself.[10] It notes that the majority opinion's empha-

8. Since its rendering, the *Milliken* decision has been authoritatively cited in 16 appellate courts and six district courts as precedent.

9. The word "misunderstood" will be used euphemistically throughout this article to refer to the Court's refusal to recognize and articulate the true nature of racial segregation. The author believes that this refusal was more the product of an intentional and knowledgeable decision than the result of any inability to comprehend. *See* text accompanying notes 107-31 *infra*. However, "misunderstood" offers a useful shorthand and takes into account the possibility that the oppressor is never fully able to comprehend the true nature of his oppression.

10. The *Milliken* decision was selected as the primary vehicle for analysis in this article because it marked the first occasion since Plessy v. Ferguson, 163 U.S. 537 (1896), in which the Court's failure to correctly identify and articulate the injury inflicted by school segregation resulted in an adverse decision for black plaintiffs. *See* text accompanying notes 107-31 *infra*. Moreover, due to the Court's reliance on the lack of inter-district injury as a basis for rejecting inter-district relief, the decision provides a particularly appropriate context in which to explore the current ramifications of the Supreme Court's failure to correctly identify the nature of the injury inflicted by segregation.

More recently, federal court decisions relying on *Milliken* have underscored the significance of the impact of that decision on the future of school desegregation litigation. *See* Dayton Bd. of Educ. v. Brinkman, 97 S. Ct. 2766 (1977); Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (Powell, J., concurring); Buchanan v. Evans, 423 U.S. 963, *aff'g per curiam* 393 F. Supp. 428 (D. Del. 1975); United States v. Missouri, 515 F.2d 1365 (8th Cir.), *aff'g and modifying en banc* 388 F. Supp. 1058 (E.D. Mo.), *cert. denied*, 423 U.S. 951 (1975); Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975); United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir.

sis on the limitations on the equitable powers of federal courts diverts our attention from the initial and necessarily precedent inquiry concerning the nature, source, and scope of the injury to plaintiffs. It argues that the *Milliken* decision reflected the Court's misunderstanding of how segregation injures black children and that this misunderstanding resulted in the Court's failure to recognize the full scope of the constitutional violation involved in that case.

Part II of the article discusses three characteristics of the institution racial segregation which must be recognized before one can understand the nature and scope of the injury which segregated schools inflict on black children: (a) racial segregation injures blacks by labeling them as inferior; (b) the existence of a system of racial segregation, not particular segregating acts, operates to injure black individuals; and (c) once the state has successfully established and institutionalized racial segregation, the institution is self-perpetuating and need not be actively maintained. Considering these three fundamental characteristics of segregation, the article maintains that because governmental involvement in the establishment of a racially segregated society was not significantly different in the North and the South, the affirmative duty to disestablish segregation should apply uniformly throughout the country.

In Part III, the article traces the development of the Supreme Court's approach to segregation from *Plessy v. Ferguson*[11] through *Brown v. Board of Education*,[12] in order to demonstrate that, far from being an aberration, the *Milliken* Court's "misunderstanding" is well established in precedent and has its roots in *Brown*.

In Part IV, the *Milliken* decision is reconsidered in light of the analytical framework proposed in Part II.

Part V analyzes three recent Supreme Court decisions[13] that rely on *Milliken* to curtail intra-district relief, and suggests that these cases do an injustice to blacks not so much because they have limited the scope of relief but because they have refused to acknowledge that blacks have been injured.

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1974), *rev'g in part* 368 F. Supp. 1191 (S.D. Ind. 1973), *cert. denied*, 421 U.S. 929 (1975). For a more detailed discussion of the *Milliken* approach as utilized in more recent interdistrict desegregation cases, *see* Note, *Interdistrict Desegregation: The Remaining Options*, 28 STAN. L. REV. 521 (1975).

11. 163 U.S. 537 (1896).

12. 347 U.S. 483 (1954).

13. Dayton Bd. of Educ. v. Brinkman, 97 S. Ct. 2766 (1977); Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

The article concludes that the Supreme Court's failure to accurately identify and articulate the nature of the injury inflicted by segregation is not so much an indication of its failure to understand segregation as it is a reflection of the nation's lack of commitment to achieving true equality for blacks.

## I. THE *MILLIKEN* DECISION

In 1970 the Detroit branch of the NAACP, joined by individual parents and students, instituted a class action suit against various state and local school district officials seeking relief from alleged illegal racial segregation in the Detroit public school system. The trial court, having found that the Detroit public school system was segregated on the basis of race as the result of official conduct and having further found that a solely intra-district remedy would result in increased rather than decreased segregation of the Detroit schools,[14] subsequently deemed that the desegregation proposals were inadequate and established a desegregation panel and ordered it to prepare a remedial plan consolidating the Detroit school system and fifty-three surrounding suburban school districts.[15] The Court of Appeals for the Sixth Circuit affirmed the district court's order on the ground that, in view of the racial composition of the Detroit school system, the only feasible remedy required the crossing of boundary lines between the Detroit school district and adjacent or nearby school districts.[16] On appeal, the Supreme Court reversed.[17]

Although the Supreme Court opinion discussed at some length what it saw as practical problems which would be encountered in the consolidation of numerous school districts by judicial decree, its decision to reject the metropoliton desegregation order of the trial court actually turned on what it considered to be fundamental limi-

14. 338 F. Supp. 582 (E.D. Mich. 1971). Because the Detroit public school population was already 63.8% black in 1970 and increasing at a greater rate than the black population of the city of Detroit, the district court found that a desegregation plan limited to that city would result in the district being perceived as an all-black district and that the resulting exodus of whites from the city would in the long run increase rather than decrease segregation. *Id.* at 585-87. The phenomena of "white flight," the mass emigration of whites from neighborhoods once large numbers of blacks have arrived, has been well documented in the context of housing as well as schools. *See* Farley, *School Integration and White Flight*, in SYMPOSIUM ON SCHOOL INTEGRATION & WHITE FLIGHT 2 (Center for National Policy Review, Autumn, 1975).

15. 345 F. Supp. 914 (E.D. Mich. 1972).

16. 484 F.2d 215, 250 (6th Cir. 1973).

17. 418 U.S. 717 (1974).

tations on the remedial powers of the federal courts. The Court said, "A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy.' "[18] As applied to the instant case, the Court held that:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.[19]

By focusing attention on the limits of the remedial powers of the federal courts,[20] Chief Justice Burger's majority opinion would lead one to believe that this decision turns on neutral principles of law. In fact, the issue of the scope of the courts' equitable power is a straw man. It is incontrovertible that the equitable power of the federal courts is limited to the correction of constitutional violations. The significant question, however, and what was really before the Court, was the definition of the "constitutional violation." By holding that the Detroit district court's choice of an inter-district remedy was in error, and that only an intra-district remedy was warranted by the facts, the Supreme Court necessarily found that there was no "constitutional violation" existing outside of the boundaries of the Detroit school system.[21] In so finding, the Court

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18. *Id.* at 738, *quoting* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

19. 418 U.S. at 744-45.

20. Chief Justice Burger said, "Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals shifted the primary focus from a Detroit remedy to the metropolitan area *only* because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable." *Id.* at 739-40 (emphasis added). While the trial court recognized that the inter-district remedy would be the only effective one and emphasized that fact, this does not preclude the possibility that the remedy may have been appropriate for other reasons, that is, that the injury to be remedied extended beyond the boundaries of the Detroit district.

21. "The record before us . . . contains evidence of *de jure* segregated conditions *only* in the Detroit schools. . . . Disparate treatment of white and Negro students occurred within the Detroit school system, and *not* elsewhere, and on this record the remedy must be limited to that system." 418 U.S. at 745-46 (emphasis added). The Court noted the presence of "one possible interdistrict violation" on the record but dismissed it as "comparatively isolated." *Id.* at 748.

declined to find an overall pattern of state involvement, and impliedly defined and limited the meaning of "constitutional violation" to be evidence in the record of *specific (and relatively recent)*[22] *statutory provisions or purposeful acts by the state or local school district directed at the creation or maintenance of segregated schools.*[23]

It is the inadequacy of this definition that lies at the heart of the *Milliken* decision's deficiencies. The definition is derived from the distinction between *de jure* and *de facto* segregation, a distinction which was first fully articulated by the Supreme Court in *Keyes v. School District No. 1.*[24] In *Keyes* the Court described two kinds of school segregation: *de jure* segregation and *de facto* segregation.[25] The Court held that only *de jure* segregation violated the equal protection clause of the fourteenth amendment. *De jure* segregation was defined as "a current condition of segregation resulting from intentional state action directed specifically to the [segregated] schools."[26] The Court emphasized that "the differentiating factor between *de jure* segregation and so called *de facto* segregation . . . is *purpose* or *intent* to segregate,"[27] and went on to give a rather detailed list of the kind of evidence which must be produced for the record in order to establish segregative purpose or intent.[28]

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22. By "relatively recent" I allude to the distinction which has been made by the court in post-*Brown* desegregation cases between segregation by law or other state action which was in existence at the time of the *Brown* decision (1954) or thereafter (which it has called *de jure*), and identical segregative laws or acts which pre-date *Brown* (which it does not consider evidence of *de jure* segregation). For discussion of the inadequacies of this distinction, *see* text accompanying notes 76-106 *infra.*

23. While the *Milliken* majority relied on the guidelines set forth in Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), regarding policies and practices with respect to school location, size and renovational additions, attendance zones, student and faculty assignment and transfer options, transportation of students, *etc.*; it specifically rejected the dissent's argument by analogy to the *Keyes* case that, having demonstrated *de jure* segregation by the state in Detroit, the same constitutional violation should be attributable by inference to the state as a whole. 418 U.S. at 748.

24. 413 U.S. 189 (1973).

25. While *Keyes* was the first northern desegregation case to reach the Supreme Court, lower federal courts used the *de facto/de jure* dichotomy as early as 1961. *See* Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967); Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied,* 380 U.S. 914 (1965); Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964); Taylor v. Board of Educ., 294 F.2d 36 (2d Cir.), *cert. denied,* 368 U.S. 940 (1961).

26. 413 U.S.at 205-06.

27. *Id.* at 208 (emphasis in original), *citing* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17-18 (1971).

28. 413 U.S. at 213-14. *See* note 23 *supra.*

Thus, Justice Brennan's opinion in *Keyes* achieved results which were applauded by proponents of school desegregation because it eased the plaintiff's burden of proving segregative intent in northern districts. The requirement of evidentiary demonstration of segregative purpose or intent as a prerequisite to the Court's finding a constitutional violation, even though less burdensome, nonetheless reinforced the distinction between northern and southern cases; it thereby created an obstacle in *Milliken* and lies at the root of the Court's failure to redress injuries suffered by black children in the Detroit schools.[29]

Besides imposing evidentiary limitations upon proving constitutional violations, the Supreme Court's use of the *de jure* and *de facto* labels has circumscribed its analysis and understanding of the constitutional rights subject to violation by segregation and subject to redress by the courts' remedial powers. The Court has attempted to draw a distinction between segregation which is mandated by law or results from purposeful or intentional state action and segregation which results "randomly"[30] or without purposeful or intentional action by the state or government. While the Court does not deny that *de facto* segregation may injure the black child,[31] it holds that

29. In southern school districts, where segregation was required or sanctioned by statute at the time of *Brown* (1954), the Court presumed that the segregation had resulted from intentional state action and the only question before the Court was the scope of relief. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), was the first non-southern school desegregation case to reach the Supreme Court, and thus, defined the Court's initial position on how it would approach school desegregation in states where segregation was not statutorily enforced at the time of *Brown*. In *Keyes*, the Court made clear that, unlike those cases involving southern districts, plaintiffs suing northern school districts would be required to produce evidence of the school district's intent to segregate. *See* text accompanying notes 76-106 *infra*. The Court held that once plaintiffs made a prima facie case establishing intent to segregate which affected a substantial portion of the school district, the entire school district would be presumed to be intentionally segregated. 413 U.S. at 207-08. Civil rights attorneys were pleased with the decision; while plaintiffs in northern desegregation suits still had the evidentiary burden of establishing intent, the *Keyes* presumption made that task substantially easier. *Id.* at 208-10.

30. As used here, "randomly" connotes lack of evidence of state motivation to segregate. Professor Ely, in *Legislative and Administrative Motivation in Constitutional Law*, argues that judicial review of allegations of discrimination should be triggered only by proof of racial "motivation." 79 YALE L.J. 1205 (1970). He assumes that "random" results are the baseline against which to examine the racial motivation underlying the acts of school authorities. Of course there is considerable difficulty in determining what is a "random" result in a society which is thoroughly permeated with discrimination of racially motivated origins.

For a detailed discussion of the problem of determining "segregative intent" in school cases, *see* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976).

31. In contrast to the Supreme Court's relaxed attitude regarding potential harmful

it is not an injury which is attributable to the state and that, therefore, the injured child has no protected "right" under the equal protection clause of the fourteenth amendment.[32] Because no "right" has been violated, the Court is without power to effect a remedy or ameliorate the injury to the child.[33] Thus, because the *Milliken* Court misunderstood the nature of the injury inflicted upon Detroit school children, it failed to find the requisite state involvement in the inter-district infliction of that injury and thereby fashion an inter-district remedy.

## II. UNDERSTANDING THE INSTITUTION OF SEGREGATION

In order to recognize the full scope of the constitutional injury inflicted by a segregated school system, one must understand how the institution of segregation functions. Three underlying characteristics of segregation crucial to this understanding are: it labels black children as inferior; the existence of the institution as a whole, rather than particular acts, constitutes the injury; and the institution is self-perpetuating.

### A. *Segregation's Only Purpose is to Label Blacks as Inferior*

What right is insured to black school children by the imperative that they not be denied equal protection of the law? It is important to remember that the basic right protected by the equal protection clause is the right not to be classified or labeled in a way that results

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effects of *de facto* segregation, J. Skelly Wright, speaking for the district court in Washington, D.C., noted:

> The complaint that, analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

32. The Supreme Court has held the provisions of the 14th amendment applicable to "state" as opposed to "private" action. Civil Rights Cases, 109 U.S. 3, 11 (1883). The fourteenth amendment provides in part, that: "No State shall make or enforce any law . . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

33. Milliken v. Bradley, 418 U.S. at 744-57 (Burger, C.J., majority opinion and Stewart, J., concurring opinion).

in one being treated differently or unequally for no legitimate reason.[34]

In general, the equal protection clause requires that when the state classifies or labels persons for purposes of treating them differently, the classification must be rationally related to a legitimate state purpose.[35] Further, if persons are classified or labeled according to their race, the state must demonstrate a compelling justification for its disparate treatment of racial groups.[36]

The holding in *Brown v. Board of Education*[37] that racially segregated schools are inherently unequal[38] makes most sense if it is understood as a recognition of the fact that racial segregation by definition is an invidious labeling device and therefore must violate the equal protection clause.[39] In abandoning the "separate but equal" doctrine of *Plessy v. Ferguson,*[40] it should have been clear to the Court that the injury to black children did not result solely from unequal resource allocation,[41] nor from the fact that they were re-

34. It is notable that segregationists fought the reversal of *Brown* in the courts on the ground that racial classification was based on legitimate innate differences in the races. *See In Defense of School Segregation,* in THE DEVELOPMENT OF SEGREGATIONIST THOUGHT 146 (I.A. Newby, ed. 1968).

35. *See, e.g.,* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). *See generally* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

36. DeFunis v. Odegaard, 416 U.S. 312, 343-44 (1974) (per curiam) (Douglas, J., dissenting); Bolling v. Sharpe, 347 U.S. 497 (1954); Korematsu v. United States, 323 U.S. 214 (1944); Strauder v. West Virginia, 100 U.S. 303 (1880).

37. 347 U.S. 483 (1954).

38. "We conclude that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id.* at 495.

39. Unfortunately, the Court's seemingly insightful recognition of the inherent inequality of segregated facilities was based not upon the simple logic that separation of a group for the sole purpose of defining or labeling them as inferior creates a classification with an impermissible purpose that necessarily violates the equal protection clause, but upon the controversial sociological evidence cited in the famous footnote 11. *Id.* at 494-95 n.11. *See* note 60 *infra* and text accompanying note 126 *infra.*

40. 163 U.S. 537 (1896).

41. Of course, separate but equal was never a reality even with respect to tangible resources. Black schools in segregated systems systematically received fewer goods and services and still do. For example, in all three of the companion cases to Brown v. Board of Educ., 347 U.S. 483 (1954), considered in 1954, Briggs v. Elliot Davis v. County School Bd., and Gebhart v. Belton, the trial courts found that the the Negro schools were inferior to the white schools in physical plant, curricula, transportation, *etc. Id.* at 486-88 n.1. It was Charles Houston's recognition of this reality that lay at the foundation of NAACP's school desegregation strategy. *See* McNeil, *Charles Hamilton Houston,* 3 BLACK L.J. 123, 126-29 (1974). *See also* Keyes v. School Dist. No. 1, 445 F.2d 990 (1971), *aff'd,* 413 U.S. 189 (1973), where the appellate court found that predominantly black and Mexican schools in the "core" area of Denver were "educationally inferior."

While there was no finding of unequal resource allocation in the *Brown* case, the Court

fused the opportunity to sit next to white children in school,[42] but from the fact that attendance at a separate school was part of the system that labeled blacks as inferior and whites as superior.[43]

The institution of segregation and the injury it inflicts on blacks is necessarily misunderstood until one recognizes that its chief purpose is to *define*, not to separate.[44] This fact is best demonstrated by a brief examination of the development of segregation in the South. Southern whites had no aversion to commingling with blacks so long as the institution of slavery made their status clear. It was only with the demise of slavery that segregation became necessary. C. Vann Woodward notes the virtual absence of segregation in the

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found that segregation denied black children "equal educational opportunity" by taking judicial notice of empirical data gathered by social scientists:

> [T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation . . . therefore, has a tendency to [retard] the educational and mental development of negro children. . . ." Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.

347 U.S. at 494 (footnotes omitted). For further discussion of why this basis for the *Brown* decision has been problematic, *see* note 60 *infra* and accompanying text.

42. There is some language in *Brown* indicating the Court's concern with associational rights: "*To separate* [black children] *from others of similar age and qualifications* solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494 (emphasis added). Some legal scholars have mistakingly seized upon this language as if it were the central concern of the case. *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959). The chief concern of blacks, however, has never been physical or social affinity but access to resources and opportunity. The black mother in Roxbury who gets up at 5:30 a.m. to put her child on a METCO bus to a suburban school in Newton knows that affluent white suburban parents will see that their children are well taught and that if her child is in the same classroom, he will reap the benefits of their political and economic power.

43. Although the Supreme Court's opinion in *Brown* dealt only with the inequality inherent in segregated schools, subsequent decisions of the Court, often per curiam decisions relying on *Brown*, have made it clear that *Brown's* identification of segregation with inequality extended beyond the school setting and that the Court recognized that the entire system was inconsistent with the equal protection clause. *See, e.g.*, Watson v. City of Memphis, 373 U.S. 526 (1963) (publicly owned parks and recreational facilities); New Orleans City Park Improvement Ass'n v. Deteige, 358 U.S. 54, *aff'g per curiam* 252 F.2d 122 (5th Cir. 1958) (public parks); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954), *vacating and remanding per curiam* 202 F.2d 275 (6th Cir. 1953) (admission to publicly owned amphitheater).

44. It is important to recognize the difference between "segregation" in which a politically powerful group imposes coerced isolation on a less powerful group, and "separation" which occurs voluntarily on the part of the less powerful group or fortuitously. Inherent in the former is the constitutionally impermissible purpose of continued subordination of the less powerful group; no such purpose is present in the latter. *See* note 61 *infra*.

South during slavery in his authoritative work on the history of segregation, *The Strange Career of Jim Crow*:

> In most aspects of slavery as practiced in the antebellum South, however, segregation would have been an inconvenience and an obstruction to the functioning of the system. The very nature of the institution made separation of the races for the most part impracticable. The mere policing of slaves required that they be kept under more or less constant scrutiny, and so did the exaction of involuntary labor. The supervision, maintenance of order, and physical and medical care of slaves necessitated many contacts and encouraged a degree of intimacy between the races unequaled, and often held distasteful, in other parts of the country. The system imposed its own type of interracial contact, unwelcome as it might be on both sides.[45]

Although historians differ in their views of when segregation became firmly established as an institution,[46] there is virtual unanimity concerning its purpose and method. Segregation was an instrument of subordination which used a strict and rigid caste system to clearly define and limit the social, political and economic mobility of blacks. The segregation statutes and "Jim Crow" laws were the "public symbols and constant reminders"[47] of the inferior position of blacks. It is the symbolism of segregation that operates to violate the fourteenth amendment. Unless *Brown* is understood in this light, it must fail in its purpose of insuring black children equal educational opportunity.[48]

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45. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 12 (3d ed. 1974). The absence of segregation in the rural slave-holding South was not an indication of racial harmony but rather a manifestation of the fact that "[i]n so far as the . . . status [of blacks] was fixed by enslavement there was little occasion or need for segregation." *Id.* at 13.

46. Woodward argues that segregation was not firmly entrenched in the South until the first decade of the twentieth century. *Id.* at 97. Other historians, however, contend that while the modern day pattern of segregating legislation did not appear until the 1890's, a highly rigid order of *de facto* segregation was widespread soon after emancipation and continued substantially unchanged throughout reconstruction. For a catalogue of the views on the historical development of segregation, *see* J. WILLIAMSON, ORIGINS OF SEGREGATION (1968).

47. C.V. WOODWARD, *supra* note 45, at 7.

48. In Strauder v. West Virginia, 100 U.S. 303 (1880), the first race discrimination case to reach the Supreme Court after the Civil War, the court relied in part on the right of blacks to be free from stigmatic harm. Justice Strong reasoned that the fourteenth amendment protects Negroes "from legal discriminations, implying inferiority in civil society." *Id.* at 308. Similarly, the fact that segregation imposes a stigma on black students has been noted by the Supreme Court in several cases since *Brown*. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 804-05 (1974) (Marshall, J., dissenting); Wright v. Council of Emporia, 407 U.S. 451, 461 (1972). *See also* Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV.

In response to contemporaneous attacks on the soundness of the *Brown* decision,[49] Charles Black wrote an article that is brilliant both in its simplicity and its clarity.[50] Professor Black pointed out that while attention is usually focused on the inequalities of the separate facilities themselves,[51] the most significant evidence of the inherent inequality of segregation can be found in looking at what it means to the people who impose it and to the people who are subjected to it:[52]

> It is actionable defamation in the south to call a white man a Negro. A small portion of Negro "blood" puts one in the inferior race for segregation purposes. . . .
>
> . . . .
>
> [P]lacing of a white person in a Negro railroad car is an actionable humiliation. . . .[53]
>
> [I]t would be the most unneutral of principles . . . to require that a court faced with the present problem refuse to note a plain fact about the society of the United States—the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority. . . .[54]

The *Brown* Court, unfortunately, was not nearly so articulate in support of its decision as was Professor Black.[55] The Court's unan-

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L. REV. 1, 8-10 (1976); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 568-69 (1965); Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 295 (1972).

49. *See, e.g.*, Weschler, *supra* note 42.

50. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

51. *See* note 43 *supra*.

52. Charles Black, Jr., Henry R. Luce Professor of Jurisprudence at the Yale Law School, is a southerner, as is C. Vann Woodward. It is interesting that enlightened southern whites have been more able and willing to understand the impact of segregation and racism on this country than have their northern white liberal brethren. For example, Justice Powell's concurrence in Keyes v. School Dist. No. 1, 413 U.S. 189, 217 (1973) (concurring and dissenting), comes closest to a correct approach to the desegregation cases, albeit with a certain tone of southern apology. Note also the insightful opinions of Justice Harlan, dissenting, in Plessy v. Ferguson, 163 U.S. 537, 552 (1896), and Circuit Judge Wisdom in United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966).

53. Black, *supra* note 50, at 426-27.

54. *Id.* at 427. *See also* Loving v. Virginia, 388 U.S. 1 (1967), where the Supreme Court, in striking down Virginia's law prohibiting intermarriage between white and black persons, rejected the argument that the law applies equally to blacks and whites and noted that "[t]he fact that Virginia prohibits only interracial marriages involving white persons demonstrates that racial classifications must stand on their own justification, as measures *designed to maintain White Supremacy.*" *Id.* at 11 (emphasis added).

55. The failure of the *Brown* opinion to directly confront the obvious meaning of segregation is attributable, in large part, to Chief Justice Earl Warren's desire to secure a unanimous

imous decision did find that "[s]eparate educational facilities are inherently unequal,"[56] but instead of resting that finding on the common knowledge[57] that segregation's purpose and function was to designate the black race as inferior or less than equal, the Court resorted to what it referred to as "intangible considerations". The Court said that "[t]o separate [Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[58] The Court then went on to quote the federal district court in Kansas which had found that "[a] sense of inferiority [engendered by segregated schools] . . . has a tendency to [retard] the educational and mental development of negro children. . . ."[59]

It is not the Supreme Court's emphasis and reliance on the psycho-sociological evidence rather than the common-sense approach that should be faulted,[60] but the Court's failure to spell out

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decision from a Court with three southern justices. Richard Kluger, in his epic work on the *Brown* decision, *Simple Justice,* has noted:

> A more stirring or incandescent opinion might have enthroned Warren as a righteous deliverer of the oppressed, but it would more than likely have cost him the unanimity of the Court. And a provocative opinion, launched by a divided Court, would almost certainly have set the South on fire with anger and defiance.

R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 713 (1976).

56. 347 U.S. at 495.

57. Professor Black noted:

> While no actual doubt exists as to what segregation is for and what kind of societal pattern it supports and implements, there is no ritually sanctioned way in which the Court, as a Court, can permissibly learn what is obvious to everybody else and to the Justices as individuals. But surely, confronted with such a problem, legal acumen has only one proper task—that of developing ways to make it permissible for the Court to use what it knows. . . .
>
> . . . .
>
> That a practice, on massive historical evidence and in common sense, has the designed and generally apprehended effect of putting its victims at a disadvantage, is enough for law. At least it always has been enough.

Black, *supra* note 50, at 427-28.

58. 347 U.S.at 494.

59. *Id.*

60. While this article will not attempt to examine the validity of the thesis that segregation operates to damage black children psychologically, it is a thesis that has promoted considerable controversy. Much of the social science evidence was considered weak when *Brown* was decided. *See* Cahn, *Jurisprudence,* 30 N.Y.U. L. REV. 150, 158-61 (1955); van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark,* 6 VILL. L. REV. 69 (1960). For a retrospective look by the social scientist who offered the controversial evidence, *see* K. Clark, *The Social Scientists, The Brown Decision and Contemporary Confusion,* in ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN

the condition precedent for black children's "feelings of inferiority"—*the fact that they and everyone else knew that the system of segregation defined them as inferior.*[61]

It was the *Brown* Court's failure to confront this simple reality about segregation that allowed Chief Justice Burger and the *Milliken* majority to conclude that there was no evidence of state involvement in the violation of the Detroit plaintiffs' constitutional rights requiring an inter-district remedy.[62]

If it is the act of separating that violates the equal protection clause, then the Detroit children's only right is to be free of specific acts of separation by the state and the scope of the remedy turns on whether there is sufficient evidence of such specific acts of separation. If, however, the equal protection clause protects the right not to be labeled or classified on the basis or race, we must look not just to whether or not the state was involved in specific separating acts but also to whether the state was involved in the creation of the socio-political system of segregation that labels segregated black children as inferior.[63] It is this principle that must be understood before a proper approach to desegregation cases can be developed.

The *Milliken* court, having defined the plaintiffs' rights under the equal protection clause as the right not to be separated, looked only for evidence of state involvement in intentional acts of

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BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-55, at xxxi (L. Friedman ed. 1969) [hereinafter cited as ARGUMENT].

For more recent challenges to the empirical basis of the Court's finding, *see* Goodman, *supra* note 48, at 426-27; St. John, *Desegregation and Minority Group Performance*, 40 REV. EDUC. RESEARCH 111 (1970). *Compare* Armor, *The Evidence on Busing* 28 PUB. INT. 90 (1972) *with* Pettigrew, Vseem, Normand & Smith, *Busing: A Review of "The Evidence"*, 30 PUB. INT. 88 (1973).

61. Interestingly enough, the Court has recognized that segregation operates as a device to define blacks as inferior in another context. In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), involving discrimination in housing, the Court discussed the congressional power to enforce the thirteenth amendment:

> Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

*Id.* at 442-43.

62. 418 U.S. at 746-47.

63. Note that it is the absence of whites in a school that attaches to it the label "segregated." All-white schools or districts are rarely so labeled. *See, e.g.*, Massachusetts Racial Imbalance Statute, MASS. ANN. LAWS ch. 71, §§ 37C, 37D (Michie/Law. Co-op Supp. 1977) (requiring local boards of education to eliminate segregation within their districts). In Massachusetts, "racial imbalance" is defined as "the condition of a public school in which more than fifty percent of the pupils attending the school are non-white." *Id.* § 37D.

*separation* of school children by race. Because this misunderstanding of the nature of segregation caused the Court to misconstrue the scope of those rights and thus to ignore pertinent evidence, the Court found no evidence of state involvement in the violation of Detroit plaintiffs' constitutional rights.

## B. *Black Children Are Injured by the Existence of the System of Segregation Not by Particular Segregating Acts*

A second aspect of the Court's misunderstanding of segregation is related to the Court's adoption of the requirement that evidence of particular segregative acts by a school district exist before a federal judge may order relief against that district. *Milliken* adopted this requirement from *Keyes v. School District No. 1*,[64] wherein the Court found that there must be evidence that the racial imbalance in the schools was brought about by discriminatory actions of state authorities.[65]

The *Keyes/Milliken* requirement of evidence of particular segregative acts by a school district before a federal court may order relief against that district demonstrates a second and related aspect of the Court's misunderstanding of segregation. Because segregation's purpose and function is to define or classify blacks as inferior, the injury which it inflicts is *systemic* rather than particular. Black school children are not injured by the fact that a school board has placed them in a school different than that in which it has placed white school children so much as by the fact that the school exists within a system that defines it as the inferior school and its pupils as inferior persons.[66]

Many black schools that existed within the segregated school systems of the South were in fact superior to their white counterparts.[67] It is ironic that most of these schools achieved their excell-

64. 413 U.S. 189 (1973).

65. *Id.* at 203.

66. White parents who resist efforts to bus their children to "black" neighborhoods often complain that they are being bussed to "inferior" schools. This perception of the quality of the school results as often as not from the schools being identified as black rather than from any notion of the quality of teaching or facilities.

67. Dunbar High School in Washington, D.C., exemplified such institutions. "In the period 1918-1923, Dunbar graduates earned 15 degrees from Ivy League colleges and universities, and 10 degrees from Amherst, Williams, and Wesleyan." Sowell, *Black Excellence: the Case of Dunbar High School*, 35 PUB. INT. 3, 7 (1974).

Such institutions were, of course, exceptions; as a rule, black schools were and are the recipient of fewer educational resources and by most objective standards are inferior.

ence as a direct result of the discrimination inherent in a segregated society, in that the best black professionals were forced into teaching by their virtual exclusion from other fields.[68] The existence of such schools violated the constitutional rights of children attending them, not because a school board or state legislature had taken steps to see that white children did not attend them, and certainly not because of the relative quality of education they provided, but because they were pieces of a larger puzzle which, when fitted together, plainly spelled out the words "if you're black, get back."[69]

Once it is understood that segregation functions as a systemic labeling device, it should be clear that *any* state action which results in the maintenance of the segregated *system* is a direct and proximate cause of the injuries suffered by black children in segregated schools and is in violation of the equal protection clause of the fourteenth amendment. Evidence of such action would, of course, not be limited to acts directly resulting in one-race schools. Segregated housing and zoning practices are equally effective means of labeling blacks as inferior.[70] If the state discriminates by continuing to participate in labeling blacks "not fit to live with,"[71] it is surely

68. In his study of Dunbar High School in Washington, D.C., Thomas Sowell found:

> Dunbar [had] its choice of teachers with outstanding academic credentials. Four of its first eight principals graduated from Oberlin and two from Harvard. Some had graduate degrees as well. Dunbar had three Ph.D.'s on its teaching staff in the 1920's, due to the almost total exclusion of blacks from most college and university faculties. (It was 1942 before there was a black senior faculty member at any major university—and he was a Dunbar graduate.)

*Id.* at 6.

69. "If you're black get back. If you're white, you're all right."

70. Taboos dealing with who one lives with or near have always been important elements of caste systems. *See generally* C. ABRAMS, FORBIDDEN NEIGHBORS (1955); J. DENTON, APARTHEID AMERICAN STYLE (1967); R. FORMAN, BLACK GHETTOS, WHITE GHETTOS AND SLUMS (1971); R. WEAVER, THE NEGRO GHETTO (1948).

71. In Hills v. Gautreaux, 425 U.S. 284 (1976), the Court distinguished *Milliken* and found sufficient federal involvement in the exclusion of blacks from public housing in suburban communities to order a metropolitan remedy. *Id.* at 297. While the Court may attempt to distinguish *Milliken* on the basis of the milieu of education as compared to housing, or on the basis of the limited jurisdiction of a defendant local school board as compared to a defendant federal housing agency, this distinction is a technical one and ignores two fundamental principles. First, the city school board is an instrumentality of the state and should not be examined in isolation so as to ignore and eliminate other evidence of state involvement in the perpetuation of segregaton. Second, a technical distinction such as the jurisdictional authority of the defendant ignores the true and underlying constitutional injury that is pervasive: the systemic injury of labeling blacks as inferior. Upon examining these two cases, it appears that the court has taken a very restrictive view in categorizing the injury, thus limiting the relevant evidence that will determine the ultimate remedy in school desegregation cases. In contrast, the Court appears more receptive to considering evidence of an injury requiring a metropolitan remedy in a non-education desegregation case such as *Hills*.

beside the point that it is not an active participant in particular acts labeling blacks "not fit to go to school with."

Chief Justice Burger and his colleagues in the *Milliken* majority, in what can only be described as "selective perception," have blinded themselves to this seemingly obvious reality. The following quote exemplifies their myopia:

> Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere. . . .
>
> *The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district.* Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit District to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so.[72]
>
> . . . .
>
> There is no claim and there is no evidence hinting that petitioner outlying school districts and their predecessors, or the 30-odd other school districts in the tricounty area . . . have ever maintained or operated anything but unitary school systems.[73]

Because Justice Burger limits the right of black children to freedom from acts by the state aimed at segregating the *schools*, such specific acts are the only kind of evidence he looks for in determining that there has been no violation for which inter-district relief would be appropriate.[74]

Once the true nature of segregation is understood, it should become equally apparent that because segregation injures by labels or classification rather than by separation itself, the scope of that injury cannot be defined by school district lines. State sanction of the purposeful segregation of schools in Detroit operates to stigmatize black children throughout the state. They do not escape that stigma merely by virtue of the fact that the defamation against

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72. 418 U.S. at 746-47 (emphasis added).

73. *Id.* at 748-49.

74. Justice Stewart, concurring, indicated that in his view "purposeful, racially discriminatory use of state housing or zoning laws" in order to maintain a segregated school system would also constitute a violation of black children's rights and justify cross-district relief. *Id.* at 755. While Justice Stewart was not explicit about why he parts ways with the Burger majority at this point, he apparently recognized that the presence of segregated housing operated to injure black children in dual fashion. First, the exclusion of their families from lily-white neighborhoods effectively excluded them from those neighborhoods. Second, the segregation of housing itself operated as part of the system that labeled them as inferior.

them occurred in another district; its publication extends throughout the state.[75]

## C. *Why Draw the Line at 1954? The Fallacy of the North/South, DeJure/DeFacto Distinction*

The Court's misunderstanding of the nature of segregation is perhaps best demonstrated by its failure to apply a consistent constitutional standard to southern *(de jure)* and northern (so-called *de facto*) varieties of segregation.[76] Since *de jure,* as compared to *de facto* segregation, is found to arise by virtue of intentional acts of the state, this distinction is at bottom a state action question.[77] Although all segregation may result in injury to black children, the factual question which must be resolved by the court is whether the state can be held responsible.[78] In states which had laws or express policies mandating segregation at the time of *Brown* the answer was clear: this was *de jure* segregation and clearly unconstitutional under *Brown.*[79]

In 1973, the court found that *de jure* segregation may also exist in the northern and western states where school segregation was not mandated by law in 1954.[80] There is, however, an important differ-

75. As J. Skelly Wright so aptly noted: "Rather, the function of equal protection here is to shield groups or individuals from stigmatization by government. Whether or not particular legislation stigmatizes is largely a sociological question requiring consideration of the structure and history of our society as well as examination of the statute itself." Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 18 (1968).

Our tort law has recognized the need for affirmative relief when the injury of defamation is involved. While retraction is not a remedy, it may serve to mitigate damages.

> A retraction, as such, however, can be effective only if it is a full and unequivocal one, which does not contain lurking insinuations, hypothetical or hesitant withdrawals or new calumnies in disguise. It must, in short, be an honest endeaver [sic] to repair all of the wrong done by the defamatory imputation, or it will merely aggravate the original offense. . . . The retraction must, in general, be given the same publicity and prominence as the defamation.

W. PROSSER, LAW OF TORTS 800 (4th ed. 1971) (footnotes omitted). *See* note 134 *infra.*

76. *See* Dimond, *School Segregation in the North: There Is But One Constitution,* 7 HARV. C.R.-C.L. L. REV. 1 (1972); Note, *supra* note 30.

77. *See* notes 24-33 *supra* and accompanying text.

78. In light of the state action requirement of the fourteenth amendment, the Court has held that only state-sponsored *de jure* segregation violates the equal protection clause. *See* cases cited notes 25 and 32 *supra.*

79. *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. New Kent County School Bd., 391 U.S. 430 (1968); Griffin v. County School Bd., 377 U.S. 218 (1964); Goss v. Board of Educ., 373 U.S. 683 (1963); Cooper v. Aaron, 358 U.S. 1 (1958).

80. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). Northern and western cases following *Keyes* have been based on the standard for determining liability set forth in that case.

ence relating to the evidentiary burdens between the Court's approach to establishing the presence of *de jure* segregation in the North and its approach to the same problem in the South. In the North the burden is on the plaintiff to demonstrate the state's direct and causal involvement in the segregation of schools,[81] while in the South the Court has held that the burden is on the defendant school district to demonstrate that it has acted affirmatively and successfully to dismantle a previously existing segregated school system. Proof of the absence of laws mandating segregation or continuing purposeful segregating acts by the state is not enough.

In *Green v. County School Board*[82] the defendant Virginia school district asserted the constitutionality of its "freedom-of-choice" plan by arguing that it was no longer directly involved in maintaining or perpetuating a segregated school system. The Court unequivocally rejected that argument and held that the school district had an affirmative duty to convert to a unitary system:

> In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system.[83]

Although the rejection of "freedom-of-choice" in *Green* appears to have been brought on by the Supreme Court's loss of patience with various southern schemes designed to resist school desegregation,[84] the Court indicated that the affirmative duty requirement grew directly out of the second *Brown* decision, *Brown II*,[85] wherein

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*See, e.g.*, Morgan v. Kerrigan, 509 F.2d 618 (1st Cir. 1975) (Boston).

81. *See* note 29 *supra*.

82. 391 U.S. 430 (1968).

83. *Id.* at 437.

84. In *Green*, the Court considered whether the school board had adequately responded to the command of *Brown II*, 349 U.S. 294 (1955), that affirmative steps be taken to eliminate racial discrimination and convert to unitary systems:

> In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine."

391 U.S. at 438, *quoting* Watson v. City of Memphis, 373 U.S. 526, 529 (1963).

85. 349 U.S. 294 (1955).

the Supreme Court set forth broad desegregation guidelines for the implementation of *Brown (I)*:

> *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent *then operating state-compelled dual systems* were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.[86]
>
> . . . .
>
> The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.[87]

Thus, according to the Court's language in *Green,* the affirmative duty requirement is limited to those school systems that were segregated by operation of law in 1954 when *Brown* was decided.

It is not clear, however, why the affirmative duty to desegregate should only be made applicable to school boards which were operating state-compelled dual systems at the time of *Brown.*[88] Dual systems in northern school districts have proven to be more firmly entrenched than those in the South.[89] The argument that in the North there is no evidence of recent governmental participation in acts directly resulting in the segregation of schools was the very argument advanced by the New Kent School Board in *Green* and rejected by the Court.

It could be argued that the northern and southern cases are distinguishable on the basis of state action; in the South, state action is present because state laws required the operation of dual school systems, while in the North, state action is absent because segregated schools occurred as the result of segregated housing pat-

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86. 391 U.S. at 437-38 (emphasis added).

87. *Id.* at 439 (emphasis in original).

88. "[T]hen operating state-compelled dual systems," *id.* at 437, has been read to mean schools segregated by law in 1954. Note that the Topeka school system, the defendant in *Brown,* had instituted a segregated school system mandated by law as recently as the early 1950's. Brown v. Board of Educ., 98 F. Supp. 797 (D.Kan. 1951).

89. In the period 1968-1971, the percentage of black students in the 11 southern states attending 80-100% minority schools was reduced from 78.8% to 32.2%; the change in the remaining states during the same period was negligible. SENATE SELECT COMM. ON EQUAL EDUCATIONAL OPPORTUNITY, *supra* note 3, at 110-11.

terns. *This distinction, however, neglects the entire history of segregation in America.*

Segregation is northern, not southern, in origin and reached considerable maturity in the North before moving south in full force.[90] Leon F. Litwack's *North of Slavery,* an authoritative account of the treatment of blacks above the Mason-Dixon Line, should be instructive to those who have been led to believe that segregation was a uniquely southern legal institution. In describing conditions in the North, circa 1860, Professor Litwack noted:

> In virtually every phase of existence, Negroes found themselves systematically separated from whites. They were either excluded from railway cars, omnibuses, stagecoaches, and steamboats or assigned to special "Jim Crow" sections; they sat, when permitted, in secluded and remote corners of theaters and lecture halls; they could not enter most hotels, restaurants, and resorts, except as servants; they prayed in "Negro pews" in the white churches, and if partaking of the sacrament of the Lord's Supper, they waited until the whites had been served the bread and wine. Moreover, they were often *educated in segregated schools,* punished in segregated prisons, nursed in segregated hospitals, and buried in segregated cemeteries.[91]

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90. C.V. WOODWARD, *supra* note 45, at 17.

91. L.F. LITWACK, NORTH OF SLAVERY 97 (U. Chi. Press 1961) (emphasis added). Litwack's more detailed discussion of separate and unequal education in the North is equally instructive:

> The means employed to exclude Negroes from the public schools varied only slightly from state to state. In New England, local school committees usually assigned Negro children to separate institutions, regardless of the district in which they resided. Pennsylvania and Ohio, although extending their public school privileges to all children, required district school directors to establish separate facilities for Negro students whenever twenty or more could be accommodated. The New York legislature authorized any school district, upon the approval of a town's school commissioners, to provide for segregation. The newer states frequently excluded Negroes from all public education, but by 1850, most of them had consented to separate instruction. In the absence of legal restrictions, custom and popular prejudice often excluded Negro children from the schools. For example, an Indianan noted in 1850 that the laws provided no racial distinction in the state school system, but "the whites rose *en-masse,* and said your children shall not go to schools with our children, and they were consequently expelled. Thus, then, we see that in this respect, there is a higher law than the Constitutional law." By the 1830's, statute or custom placed Negro children in separate schools in nearly every northern community.
>
> Proposals to educate Negroes invariably aroused bitter controversy, particularly in the new western states. The admission of Negroes to white schools, opponents maintained, would result in violence and prove fatal to public education. Moreover, some contended that Negroes, "after a certain age, did not

Based on historical fact, it cannot be refuted that the official actions of northern, midwestern and western states played a predominant role in the entrenchment of segregation within their borders.[92] In view of the fact that there was substantial state activity in the promulgation of segregation throughout the nation, the fact that the northern states ceased official enforcement of a segregated school system prior to 1954, while the southern states continued to do so officially, does not appear to be an adequate rationale for exempting northern states from the mandate of *Brown*, as further elucidated by *Green*. Thus, the Supreme Court's distinction between northern and southern cases of desegregation is not really a matter of state action at all, and is simply a matter of timing.

Although the Supreme Court holdings dictate a chronological distinction between pre- and post-1954 legislation, the Court's *reasoning* in *Green* would appear to counsel the contrary conclusion that the cases be treated on the basis of their facts and not be categorized by region or date. *Green* stands for the propositon that where a system of segregation remains firmly entrenched the state must do more than cease and desist from further official support of the system; it must *act affirmatively* to disestablish that system.[93] Once it is understood that segregation achieves its purpose by labeling blacks as inferior, it becomes clear that segregation is firmly entrenched when the label of inferiority is reflected in societal attitudes;[94] moreover, once the label is firmly affixed, it will not be removed or alleviated by a mere discontinuance of official name-

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correspondingly advance in learning—their intellect being apparently incapable of being cultured beyond a particular point." . . . Opponents also warned that equal educational privileges would encourage Negro immigration and antagonize southern-born residents. On the basis of such a pretext, a California mayor vetoed appropriations for Negro schools as "particularly obnoxious to those of our citizens who have immigrated from Southern States." The city aldermen defended his action with a warning against placing the two races on an equal basis, "not withstanding the distinction stamped by Divinity between them."

*Id.* at 114-16 (footnotes omitted).

92. The segregation of federal programs and facilities such as the armed forces should also be noted. *See* note 100 *infra* and accompanying text. Federal involvement in the establishment of segregation operated to injure blacks throughout the country and thus to abridge their rights under the fifth amendment.

93. *See* note 86 *supra* and accompanying text.

94. "Behavior change can be induced by the application of many kinds of external pressure, ranging from legal enforcement to neighborhood custom. But a genuine translation of such behavior into an enduring change in attitude is a long process involving important psychological processes." GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRIC ASPECTS OF SCHOOL DESEGREGATION 31 (1957).

calling.[95] This understanding applies to all instances of segregation and knows no geographic distinctions.

The state has acted to establish a self-perpetuating institution.[96] Because there has been no affirmative action by the state to disestablish the institution, it remains intact. The segregated systems of the North and West are *not "de facto"*. They have not occurred in the absence of official action. Rather, they are creatures of the state and the affirmative duty to destroy them that was imposed on the New Kent School District in *Green* should be universally applicable.[97]

Without doubt, it will be argued that the causal link between constitutional violations existing in northern states in the distant past and presently segregated schools is too tenuous to support the application of the *Green* standard to those districts. At the root of this argument is the belief that racial segregation in the North, as we know it today, is the result of the ingrained racial prejudice of individuals in the absence of state assistance, encouragement or compulsion.[98] This is simply not the case. Governmental participation in and support of the system of segregation in the northern and western states was not a relic of the past at the time of the *Brown* decision.[99] Three notable examples of modern day governmental

95. *See* note 75 *supra.*

96. Gunnar Myrdal has identified the circular self-perpetuating nature of racial prejudice and discrimination as the principle of "cumulative causation." Once blacks are labeled as inferior, they are denied access to equal societal opportunities. The resulting inadequate educational preparation, poverty of cultural backgrounds, and lack of experience constitute real limitations on their ability to contribute to society and the prophecy of their inferiority is fulfilled. *See* G. MYRDAL, AN AMERICAN DILEMMA 75-76 (1944). *See also* Lawrence, *Negroes in Contemporary Society*, in MAN, CULTURE, AND SOCIETY 55-56 (C. Lawrence ed., Brooklyn College Press, 1962).

97. Recent federal court decisions refusing to find "*de facto* discrimination" unconstitutional are indicative of the courts' continuing refusal to acknowledge the self-perpetuating nature of the institution of segregation and other institutionalized discriminatory devices. Increasingly, courts are requiring well-proved evidence of specific discriminatory acts upon which to base relief. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); Bakke v. Regents of the Univ. of Cal. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977).

98. While there is a grain of truth in the notion that all societal behavior stems from a conglomerate of individual attitudes, the manner in which government copes with the overt manifestations of popular prejudice determines whether or not it will be eliminated or minimized. Likewise, governmental action may encourage private prejudice and insure its continued prosperity and institutionalization.

99. In an article on residential segregation, Loren Miller attributes the chief cause of so-called *de facto* segregation in northern schools to state action in one form or another:

Residential segregation as we know it today is the end-product of more than a

segregation contemporaneous with *Brown,* which labeled blacks as inferior in the North as well as the South, were the continued segregation of the United States Armed Forces until 1948,[100] the Federal Housing Administration's active encouragement of segregated housing until 1950,[101] and the statutory segregation by Congress of Washington D.C.'s school system until 1954.[102] State and local officials have played an equally active, although not as well-documented, part in the maintenance of the system of segregation in the North. Highways and freeways were built as barriers between black and white communities,[103] building officials did their utmost to hamper

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half-century of intensive governmental sanction and support of private segregatory devices, and of the exercise of ingenuity on government's own part to achieve that same end. At one time or another in that more than fifty years, state legislatures, city councils, planning commissions, governors, state and federal courts, state and federal housing agencies, and United States Supreme Court, Congress and even Presidents lent willing hands to lay the firm foundation for the gaudy superstructure of residential segregation that towers above today's American cities.

Miller, *Government's Responsibility for Residential Segregation,* in RACE AND PROPERTY 60 (J. Denton, ed. 1964).

100. *See* J. GREENBERG, RACE RELATIONS AND AMERICAN LAW 355-57 (Colum. U. Press 1959).

101. While restrictive covenants proliferated in an ad hoc manner apart from the Federal Housing Administration (FHA), they spread en masse under govenment compulsion because FHA refused to aid construction for racially mixed occupancy. As of 1948, FHA had not insured a single nonsegregated project. The FHA underwriting manual said, "If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes." FHA, UNDERWRITING MANUAL § 937 (1938), *quoted in* C. ABRAMS, *supra* note 70, at 230. The FHA drafted and urged adoption of racially restrictive covenants, and in numerous official pronouncements it advocated residential segregation. Its position was based upon the general, uncritically accepted assumption that the entry of blacks into white neighborhoods diminishes property values. For a detailed description of FHA's role as a propagator of housing segregation, *see* C. ABRAMS, *supra* note 70, at 229-43. *See generally* R. WEAVER, *supra* note 70; Comment, *The Public Housing Administration and Discrimination in Federally Assisted Low-Rent Housing,* 64 MICH. L. REV. 871 (1966).

102. *See* Bolling v. Sharpe, 347 U.S. 497 (1954). In this companion case to *Brown,* the Supreme Court held that school segregation by the federal government in the District of Columbia violated the due process clause of the fifth amendment.

The continued presence of *de jure* segregation within federal agencies well into the middle of the twentieth century raises an interesting question: do the policies and practices of the federal government in perpetuating a segregated system constitute state action in the context of school segregation at the state level when those policies have the effect of fostering segregation in the schools? Another question arises as to whether the fifth amendment due process clause protects only children in the District of Columbia from federally sanctioned segregation. If the injury results from the act of separation, then the issue is moot. But if black children are injured by the *label* placed upon them by the *system* of segregation, then federal segregation of housing and the armed forces is a constitutional violation of all black children's rights to due process.

103. *See* Davis, *The Effects of a Freeway Displacement on Racial Housing Segregation*

building intended for blacks in white neighborhoods,[104] local police and fire departments excluded blacks by discriminatory hiring practices,[105] and until 1948 local courts consistently enforced restrictive covenants.[106]

Once the state has effectively institutionalized racial segregation as a labeling device, only minimal maintenance is required to keep it in working order. Once the system is established, any attempt to distinguish "active" governmental involvement in racial segregation from "passive" or "neutral" tolerance of private segregation is illusory. Present passivity is merely a continuation of past action. The individual facing well-entrenched segregated housing patterns does not make a wholly "private" choice when deciding to move into a neighborhood with persons of a like race. That choice is substantially influenced by societal or institutional pressures to conform to the prevailing norm. Job security and opportunity for advancement, availability of financing, and one's family's personal comfort may all depend upon such conformity. These institutionalized attitudes or norms are directly traceable to a time when the state was actively involved in their establishment. There has not been an intervening period in which these attitudes were not present so that it could truly be said they were private in origin. They remain because the state has never met the *Green* requirement of affirmative disestablishment.

## III. THE HEART OF THE *PLESSY* DOCTRINE IS ALIVE AND WELL

While the *Milliken* case is used herein as a point of departure and reference, the Burger Court does not stand alone in history in its misunderstanding of segregation. There is ample precedent for

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*in a Northern City*, 26 PHYLON 209, 214 (1965); Roberts, *Homes, Road Builders and the Courts: Highway Relocation and Judicial Review of Administrative Action*, 46 So. CAL. L.R. 51, 55 (1972); Sevilla, *Asphalt Through the Model Cities: A Study of Highways and the Urban Poor*, 49 J. URB. L. 297 (1971).

104. *See* Hills v. Gautreaux, 425 U.S. 284 (1976); L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION 123-31 (1968); Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63 (1970).

105. *See* Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Western Addition Community Organ. v. Alioto, 360 F. Supp. 733 (N.D. Cal. 1973).

106. *See* Shelley v. Kraemer, 334 U.S. 1 (1948). *See also* Miller, *supra* note 99, at 62.

the Court's failure to face up to the realities of "Jim Crow." Furthermore, it is evident that the Court's failure has been more intentional than not.

The first[107] and most transparent example of the Supreme Court's choosing not to "call it like they must have seen it" is *Plessy v. Ferguson,*[108] the source of the infamous doctrine of "separate but equal."[109] In *Plessy,* the Court upheld a Louisiana statute requiring separate facilities for white and black passengers on trains as not violative of the fourteenth amendment prohibition of unequal protection of the laws.

The Court said the object of the fourteenth amendment "was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce *social, as distinguished from political equality,* or a commingling of the two races upon terms unsatisfactory to either."[110] Without doubt, it was obvious to any adult living in the United States in 1896 that the "social" and "political" inequality of blacks were inextricably interwoven.[111] In any event, it is clear that the Justices who joined the *Plessy* majority must have understood the nature of segregation if only because their colleague, Justice Harlan, had explained it to them so clearly in his dissent:

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107. Although Plessy v. Ferguson, 163 U.S. 537 (1896), was the first case in which the Supreme Court directly confronted the question of whether segregation violated the equal protection clause of the 14th amendment, several earlier decisions suggested the segregationist tendencies of the Court and a clear penchant for judicial inconsistency where necessitated by white supremacy. In Hall v. DeCuir, 95 U.S. 485 (1878), the Court held that a Louisiana statute requiring integrated facilities on passenger vessels was an unconstitutional interference with interstate commerce. Five years later, in the Civil Rights Cases, 109 U.S. 3 (1883), the Court held that the federal laws prohibiting segregation were also unconstitutional. Shortly thereafter, in apparent conflict with its nullification of the Louisiana integration law, the Court held in Louisville, New Orleans & Tex. Ry. v. Mississippi, 133 U.S. 587 (1889), that a Mississippi railroad segregation act did not constitute interference with interstate commerce.

108. 163 U.S. 537 (1896).

109. The doctrine of separate but equal apparently originated in Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 206 (1850), but it was first articulated by the Supreme Court in Plessy v. Ferguson, 163 U.S. 537, 544-45 (1896).

110. 163 U.S. at 544 (emphasis added).

111. In his "Atlanta Compromise" speech of 1895, Booker T. Washington told his white audience that "[i]n all things that are purely social we can be separate as the fingers, yet one as the hand in all things essential to mutual progress." R. KLUGER, *supra* note 55, at 70. There is every indication that his analysis was more a reflection of what he knew whites wanted to hear than it was an expression of a genuine belief that the social and political status of blacks in the United States could be separated.

> What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, *proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?* That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.[112]

Whether the *Plessy* majority feigned blindness to the real and obvious meaning of segregation on railways because they themselves were committed to white superiority,[113] or because they realized that the nation's commitment to the same would have made enforcement of a contrary decision impossible and therefore judicially unsound, is open to debate. There is, however, no questioning the fact that the *Plessy* Court's articulation of an incorrect understanding of the nature of segregation was the result of a conscious decision.

The Supreme Court was somewhat more subtle but no less astute in avoiding any discussion of the real meaning of segregation in the graduate and professional school cases which paved the way for *Brown.* In *Missouri ex. rel. Gaines v. Canada;*[114] *Sipuel v. Board of Regents;*[115] *Sweatt v. Painter;*[116] and *McLaurin v. Oklahoma State Regents for Higher Education;*[117] the Court, in considering the constitutionality of segregated graduate study programs at public universities, found it unnecessary to re-examine the "separate but equal" doctrine in order to grant desegregation relief to the plaintiffs.[118]

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112. 163 U.S. at 560 (Harlan, J., dissenting) (emphasis added).

113. Justice Henry Billings Brown, the author of the *Plessy* majority opinion, was a native of Massachusetts and a pre-war Republican, but had been unfriendly toward abolition. In his *Plessy* verdict, Justice Brown relied heavily upon the segregationists' reasoning of Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850), authored by another son of the Bay State, Chief Justice Lemuel Shaw. Thus, it was two northerners who established the rationale and legality of segregation, while Justice Harlan, a native southerner and former slave-holder, voiced the nation's most significant objection.

114. 305 U.S. 337 (1938).

115. 332 U.S. 631 (1948).

116. 339 U.S. 629 (1950).

117. 339 U.S. 637 (1950).

118. The Court's failure could be attributed in part to the NAACP's litigation strategy. Blacks were aware that segregation had to be destroyed as a system before political equality could be achieved. Education, and more particularly graduate and law school education, was chosen as the initial target of attack for several strategic reasons including the fact that the absence of black graduate and law schools in many southern states meant that those states were subject to attack under the *Plessy* doctrine. But Charles Houston, Special Counsel for the NAACP between 1935 and 1940, and the chief architect of the pre-*Brown* strategy, made

In *Sweatt,* in finding that a segregated law school for blacks could not provide them equal educational opportunities, the Court relied on "those qualities which are incapable of objective measurement but which make for greatness in a law school."[119] In *McLaurin* the Court required that a black admitted to a white graduate school not be segregated within the classroom and cafeteria and should be treated like all other students; again, the Court based its decision on the intangible considerations of "his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[120] In neither opinion was there mention of the obvious fact that in each case the state had relegated black students to a separate school or separate seats within the classroom for the specific purpose of designating them inferior.[121]

This article has already touched upon the Warren Court's failure in *Brown v. Board of Education*[122] to support the holding that "segregation is inherently unequal" with what was the obvious, simplest, and most clearly unassailable rationale.[123] Instead of taking judicial cognizance of the fact that the manifest purpose of segregation was to designate blacks as inferior and noting that such a purpose was constitutionally impermissible,[124] the Court chose to focus upon the effect of school segregation.

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clear his understanding of both the source of the harm and of the ultimate goal. In a speech before the National Bar Association in 1935, he said that "Equality of education is not enough. There can be no equality under a segregated system. No segregation operates fairly on a minority group unless it is a d[o]minant minority. . . . The American [Negro] is not a dominant minority; therefore he must fight for complete elimination of segregation as his ultimate goal." Speech by Charles Houston, National Bar Ass'n Convention, "Proposed Legal Attacks on Educational Discrimination." (Aug. 1, 1935) (uncorrected typescript *excerpted in* McNeil, *supra* note 41, at 126.

119. 339 U.S. at 634.

120. 399 U.S. at 641.

121. The Court has been reluctant to inquire into legislative motive because of the difficulty of determining the sole or dominant motivation behind the choices of a group of legislators. Palmer v. Thompson, 403 U.S. 217 (1971); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). Cases where the enactments resulted in different treatment for whites and blacks and where no other rationally related purpose has been set forth by the state, *see, e.g.*, Griffin v. County School Bd., 377 U.S. 218 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960), have been distinguished by the Court, *see, e.g.*, Palmer v. Thompson, 403 U.S. 217, 221-25 (1971).

122. 347 U.S. 483 (1954).

123. Virtually contemporaneous with the passage of the fourteenth amendment, the Supreme Court reviewed the history of that amendment in the Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1873). The Court concluded that there was one prevailing purpose to the amendment: "we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.* at 71.

124. *See* text accompanying notes 37-59 *supra.*

In *Brown,* Chief Justice Warren, speaking for a unanimous Court, began the crucial portion of his opinion by describing the importance of education in achieving political equality. He then proceeded to cite evidence presented to the Court by social scientists indicating that the effect of school segregation on black children was to generate "a feeling of inferiority" that in turn affects the motivation and ability of these children to learn.[125] In short, segregation violated the equal protection clause because of its empirically demonstrated discriminatory effect on the educational/political opportunity afforded blacks. While the evidence and reasoning were sound, the Court's choice of rationale avoided any direct refutation of the *Plessy* dicta that the fourteenth amendment was not "intended to abolish distinctions based on color, or to enforce social, as distinguished from political equality."[126] More importantly, by focusing on *effect* the Court avoided any recognition of the fact that the *purpose* of the "social" inequalities of the system of segregation is the maintenance of "political" inequality.

Again, there is every indication that the *Brown* Court's choice of a rationale that avoided any explicit mention of the true nature of segregation was not without design. The simplicity of holding segregation unconstitutional because of its impermissible purpose must have been apparent to the Court.[127] Moreover, among the arguments made by counsel for plaintiffs in brief and in oral argument was the argument that the express purpose of the fourteenth amendment was to deprive the states of the authority to enforce existing "black codes"[128] or in the future set up additional "black codes" and

125. 347 U.S. at 494.

126. 163 U.S. at 544. Note that while the Court in Brown v. Board of Educ., 347 U.S. 483 (1954), said that "[a]ny language in *Plessy v. Ferguson* contrary to this finding is rejected," 347 U.S. at 494-95, the *Brown* finding dealt only with segregated *education* and has never been read as reversing any part of *Plessy.* Although the Supreme Court's opinion in *Brown* dealt only with the inequality inherent in segregated schools, a subsequent series of per curiam decisions declaring the segregation of public facilities unconstitutional made it clear that the *Brown* holding extended to areas which the *Plessy* Court's definition would have considered social. *See, e.g.*, State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (involving athletic contests); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (involving public parks); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (involving public golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (involving public beaches). By using per curiam decisions in these cases, the Court again avoided the opportunity to controvert the *Plessy* dicta distinguishing "social" from "political" equality.

127. *See* Black, *supra* note 50, at 428.

128. A great fear of black insurrection and revenge following the abolition of slavery resulted in the adoption of "black codes" by the provisional legislatures established by President Johnson in 1865. These codes were intended to establish a system of peonage or apprenticeship resembling slavery. *See* C.V. WOODWARD, *supra* note 45, at 23.

that segregation laws, like the black codes, were designed to establish a caste system.[129] The *Brown* plaintiffs also relied heavily, in both brief and oral argument, upon *Strauder v. West Virginia,*[130] a case which discussed the purposes of the fourteenth amendment at some length with the benefit of historical proximity to its adoption. *Strauder,* in holding the total exclusion of blacks from juries unconstitutional, spoke of the fourteenth amendment as follows:

> The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—*exemption from legal discriminations, implying inferiority in civil society,* lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[131]

In the period of over twenty years since *Brown,* the Supreme Court has considered numerous school desegregation cases without expanding upon or more fully articulating its rationale. In all of these cases *Brown* has been cited for its holding that continued school segregation was inherently incompatible with the equal protection clause without significant further comment upon or reconsideration of why.

## IV. *MILLIKEN* RECONSIDERED

Thus far three major points which provide an analytical framework for reconsidering the *Milliken* case have been discussed.

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129. In *Brown,* Thurgood Marshall, attorney for the plaintiff, citing Strauder v. West Virginia, 100 U.S. 303 (1880), and noting that the separate but equal doctrine of *Plessy* was inconsistent with *Strauder,* made the following point during oral argument:

> [Y]ou cannot escape this point: that the Amendment was adopted for the express purpose of depriving the states of authority to exercise and enforce the existing Black Codes; that by putting it in the Constitution it was obviously intended that the states would not have the power in the future to set up additional Black Codes; and to use the language of this Court in one case, *Lane v. Wilson,* [307 U.S. 268 (1939)], whether it is sophisticated or simple-minded; and the part that is to my mind crucial in this case, is that until this time the appellees have shown nothing that can in any form or fashion say that the statutes involved in these cases are not the same type of statutes discussed in the debates and in the decision of the Court nearest to that, namely the Black Codes, and I do not see how the inevitable result can be challenged, because they are of the exact same cloth, when you go to these Black Codes.

1953 Oral Argument for Brown v. Board of Educ., 347 U.S. 483 (1954), in ARGUMENT, *supra* note 60, at 198.

130. 100 U.S. 303 (1880).

131. *Id.* at 307-08 (emphasis added).

First, the injury inflicted upon black children by segregation is one of pejorative classification. This injury occurs by virtue of the existence of the system or institution of segregation rather than particular segregating acts.[132]

Second, the equal protection clause of the fourteenth amendment is violated by significant state involvement in the creation or maintenance of the socio-political system of segregation, and the constitutional rights of black children are violated whenever the state acts to perpetuate that system.[133] This is true without regard to whether the purpose or direct result of the act is the segregation of schools themselves, and such a constitutional violation may not be limited in scope by the boundaries of a school district or other subdivision of the state.[134]

Third, the affirmative duty to disestablish segregation set forth in *Green v. County School Board*[135] must apply to all states who have played a predominant role in its establishment regardless of their geographic location or the date upon which statutes mandating segregation were removed from their books.[136]

If the *Milliken* case is reconsidered in light of this analysis, it becomes apparent that affirmation of the district court opinion ordering an inter-district remedy[137] is compelled on several grounds. First, the state had recently participated in the segregation of Detroit schools; the record contained clear uncontroverted evidence of state involvement in the segregation of Detroit schools.[138] This activity by the state labeled or classified as inferior not just Detroit black children but all black children upon whom the state could exert its power or from whom it could require obedience. Because the injury of the labeling of black children as inferior reached beyond the boundaries of the Detroit school district, the constitutional right to

132. *See* text accompanying notes 34-63 *supra*.

133. *See* text accompanying notes 64-75 *supra*.

134. Because the publication of the defamation against black children has clearly extended beyond any particular school district's boundaries, the relief is inadequate if it is restricted by such boundaries. In order to mitigate damages, the retraction of a defamation must be coextensive with the publication of the defamation itself. *See* note 75 *supra* and accompanying text.

135. 391 U.S. 430 (1968).

136. *See* text accompanying notes 82-106 *supra*.

137. 345 F. Supp. 914 (E.D. Mich. 1972).

138. In the *Milliken* decision the Supreme Court made note of the findings of the district court and the court of appeals in this regard: "The record before us, voluminous as it is, contains evidence of *de jure* segregated conditions only in the Detroit schools. . . ." 418 U.S. at 745.

be free of that injury also extended beyond the district. By redefining the nature of the constitutional infringement, the remedy must be likewise altered. According to the *Milliken* majority's own reasoning, "the scope of the remedy is determind by the nature and extent of the constitutional violation."[139] Thus, an inter-district remedy was clearly appropriate.

Second, in all likelihood the state had participated in the maintenance of segregated housing in the suburbs.[140] Although Justice Stewart, concurring, found no evidence on the record of racially discriminatory use of housing or zoning laws,[141] it is unlikely that the ubiquitous presence of exclusively white housing in the Detroit suburbs had occurred entirely without state participation or accommodation.[142] Such discrimination did as much to classify black children as inferior as sending them to separate schools; it constituted another constitutional violation which was multi-district in scope and therefore properly subject to an inter-district remedy.

Third, the state had never disestablished the segregated school system which it played a significant role in creating. While the *Milliken* majority indicated that there was no evidence hinting that outlying school districts had historically maintained other then unitary school systems,[143] a more careful review of the history of the

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139. *Id.* at 744, *citing* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

140. *See* notes 99 and 104 *supra.*

141. 418 U.S. 753-55 (Stewart, J., concurring). The fact that there was no such evidence in all likelihood stems from the fact that the litigation was initially based on a theory that required evidence of *de jure* segregated conditions in Detroit schools only. That was the theory upon which the district court took evidence at trial. *Id.* at 745.

142. Justice Douglas discussed the "expanded *de jure*" argument in Gomperts v. Chase, 404 U.S. 1237 (1971), when the Court denied a stay of the lower court order pending appeal. *Id., denying injunct. pending appeal,* 329 F. Supp. 1192 (N.D. Cal. 1971). After admitting that "the precise contours of *de jure* segregation have not been drawn by the Court," 404 U.S. at 1238, Justice Douglas outlined the following sources, alleged by plaintiffs to be the governmental agencies responsible for racial imbalance:

> (1) California's Bayshore Freeway effectively isolated Blacks and resulted in a separate and predominantly black high school.
>
> (2) State planning groups fashioned and built the black community around that school.
>
> (3) Realtors—licensed by the States—have kept "white property" white and "black property" black.
>
> (4) Banks chartered by the State shaped the policies that handicapped blacks in financing homes other than in black ghettoes.
>
> (5) Residential segregation, fostered by state enforced restrictive covenants, resulted in segregated schools.

404 U.S. at 1239.

*See also* Hills v. Gautreaux, 425 U.S. 284 (1976) (discussed in note 71 *supra).*

143. *See* note 73 *supra* and accompanying text.

Michigan legislature reveals that in 1845 the legislature approved the incorporation of a school for Negroes only after the adoption of an amendment expressly prohibiting the admission of whites.[144] It might well be argued that an 1867 Michigan act requiring that school districts provide education without discrimination as to race, and a 1963 amendment to the Michigan Constitution providing for non-discriminatory educational opportunity have operated to repeal the previous discriminatory laws.[145] But mere repeal of segregation statutes and the passage of time is not sufficient to satisfy the command of *Green.* In the face of evidence of a still well-entrenched dual system, Michigan had clearly not met the burden of coming forward with a plan in which racial discrimination was eliminated "root and branch," a plan that "promised realistically to work now."[146]

## V. THE FRUIT OF *MILLIKEN:* THE COURT CURTAILS INTRA-DISTRICT RELIEF

In three recent Supreme Court decisions the Supreme Court reaffirmed its refusal to recognize the true nature of the injury inflicted by the institution of segregation. In vacating federal district and circuit court desegregation orders in *Pasadena City Board of Education v. Spangler,*[147] *Austin Independent School District v. United States,*[148] and *Dayton Board of Education v. Brinkman,*[149] the Court followed the pattern set in *Milliken* and purported to question only the scope of the remedy ordered by the lower courts. A closer look at the three opinions, however, reveals that the remedies ordered are inappropriate only because the Supreme Court has once again ignored the rather obvious truths about segregation set forth above.

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144. L.F. LITWACK, *supra* note 91, at 122-23, *citing* THE LIBERATOR (Apr. 4, 1845).

145. *See* People *ex rel.* Workman v. Board of Educ., 18 Mich. 400 (1869) (citing Act 34, § 28 of 1867 Mich. Pub. Acts).

The Michigan Constitution provides, in part, that "[e]very school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin." MICH. CONST. art. 8, § 2. The Michigan laws provide, in part, that "[n]o separate school or department shall be kept for any person or persons on account of race or color." MICH. COMP. LAWS ANN. § 340.355 (1976), and that "[a]ll persons, residents of a school district . . . shall have an equal right to attend school therein." *Id.* § 340.356. *See also* Act 318, pt. II, chs. 2, 9, Mich. Pub. Acts of 1927.

146. *See* notes 86 and 87 *supra* and accompanying text.

147. 427 U.S. 424 (1976).

148. 429 U.S. 990 (1976).

149. 97 S. Ct. 2766 (1977).

In *Pasadena,*[150] the Supreme Court found the district court in error when, in 1974, it refused to modify its 1970 desegregation order to eliminate the requirement that there be "no school in the [district] with a majority of any minority students."[151] The Court noted that the defendant board had been in literal compliance with this provision of the order in the initial year of its operation; while some five schools were ostensibly in violation of the district court's "no majority of any minority" requirement at the time of the hearing on the motion to modify, there was no showing that the post-1971 changes in racial mix of those schools were caused by segregative acts chargeable to defendants. The Court found that compliance with the pupil assignment requirement in 1970 "established a *racially neutral* system" in the school district and that "[n]either school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."[152]

But, had the school board met its affirmative duty to eliminate state created discrimination from the system? Had it established a *racially neutral* system? The answer is clearly *"no."* In its original order, the district court had found the existence of a segregated or dual system by virtue of the district's policies with regard to the hiring, promotion and assignment of teachers and professional staff members; the construction and location of facilities; and the assignment of students.[153] All of the practices served separately and cumulatively to stigmatize blacks and the schools they attended and at which they taught.

The Supreme Court refused to understand, however, that once the stigma is affixed by the existence of a dual school system, the injury remains, at the very least, until the state has ceased all official name calling, that is, by way of hiring and promotion of teachers and construction and location of schools as well as by student assignment. The Court perceived the assignment of students as a distinct and separable constitutional violation which could be independently corrected, and held that once the school board had met

150. 427 U.S. 424 (1976).

151. *Id.* at 431.

152. *Id.* at 436, *quoting* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971).

153. 311 F. Supp. 501, 505 (C.D. Cal. 1970).

this requirement of the order it could not be held responsible for any further violation. The Court ignored the probability that much of the "white flight" which had caused the "desegregation" between 1971 and 1974 had occurred because the schools involved continued to be identified as "black" schools and because the school district by its teacher assignment practices continued to label blacks as inferior and unfit to go to school with.

In *Austin Independent School District v. United States*,[154] the Supreme Court issued a per curiam opinion vacating a Fifth Circuit desegregation order requiring extensive busing within the school district. In a concurring opinion which echoed the *Milliken* holding that the remedy must be co-extensive with the proven wrong, Justice Powell noted that "large-scale busing is permisible only where the evidence supports a finding that the extent of the integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past."[155]

While *Milliken* is cited in *Austin* for the proposition that the remedy should not exceed the scope of the violation,[156] Justice Powell has gone even further in curtailing plaintiffs' chances for gaining relief, establishing a presumption of innocence in favor of the defendant school district. This shifting of the burden of proof is unprecedented; plaintiffs must now prove that each instance of segregation within a district would not have occurred *but for* the intentional acts of the school board. This represents a radical retreat from *Keyes v. School District No. 1*[157] which established the rule that once plaintiffs establish intent to segregate which affects a substantial portion of the school district, it will be presumed that all remaining segregation in the district resulted from intentional state action. The Supreme Court has once again ignored the fact that when the school board intentionally segregates one school, it has not only stigmatized the black children in that school but it has done so to all of the black children in the district.

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154. 429 U.S. 990 (1976).

155. *Id.* at 995 (Powell, J., concurring and dissenting).

156. *Id.* at 991.

157. 413 U.S. 189 (1973). In *Keyes*, the Court held that once plaintiffs had produced evidence establishing intentional segregatory actions affecting a substantial portion of the district, the presence of a dual system would be *presumed* and the burden would shift to the defendants to rebut that presumption by showing: (1) "that segregative intent was not among the factors that motivated [government] actions"; or (2) that government actions "were not a factor in creating a natural environment for the growth of further segregation." *Id.* at 210-11.

Likewise, in *Dayton Board of Education v. Brinkman*,[158] the Supreme Court vacated a federal district court order which required that all schools be brought within fifteen percent of Dayton's forty-eight to fifty-two percent black-white population ratio.[159] The Supreme Court found that a constitutional violation affecting only high schools, whereby optional attendance zones could be used to allow white students to avoid attending predominantly black schools, would not justify an order requiring that all schools be integrated.

Relying on *Austin*, Justice Rehnquist, writing for the majority, reiterated Justice Powell's new twist on the *Milliken* rule that the scope of the remedy not exceed the scope of the violation.[160] In particular, he found that the district court "must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations."[161]

But the Court has done more than simply apply the *Milliken* test. Insult has been added to injury in citing *Keyes v. School District No. 1* as precedent[162] for this novel placement of the evidentiary burden. The rule established in *Keyes* would clearly have required that, a prima facie case of intentional segregation having been made, the burden would shift to the school district to prove that existing segregation in the district was not the result of its acts. The *Dayton* Court, thus, misinterpreted *Keyes* when it placed the full burden of proving constitutional violation or injury on the plaintiffs without applying the *Keyes* presumption.

Only by ignoring the nature of the institution of segregation can the Supreme Court hold that a school board may declare black high school students unfit to go to school with white students and fail to recognize that black elementary school children in the same school district are equally injured by that declaration. When black high school students are labeled inferior by segregation, their younger brothers and sisters in elementary school do not escape that label. Thus, the constitutional violation pervades the entire school system, if not the entire community of Dayton.

158. 97 S. Ct. 2766 (1977).
159. *Id.* at 2769.
160. *Id.* at 2775.
161. *Id.*
162. *Id.*

In the *Pasadena, Austin* and *Dayton* decisions the Court has reaped the "strange fruit" of *Milliken.* While professing to be concerned only with the inequities of lower court remedies, the Court has used its "misunderstanding" of the institution of segregation to ignore both intra- and inter-district violations of the rights of black children.

Recently there have been serious questions raised concerning the necessity and propriety of insisting on full and complete integration of schools or racial balance in pupil assignmment as a remedy to the constitutional injury of segregated schools.[163] The reluctance of civil rights attorneys to re-examine the dogma that in every situation equal educational opportunity must mean integrated schools is somewhat disturbing. It is suggested, however, that a proper understanding of the injury inflicted by segregation provides plaintiffs as well as the Court with more flexibility in devising the remedy which need not be limited to the remedy of complete racial integration or *no* remedy at all.[164]

What must be clear is that blacks are entitled to a removal of the defamatory label. If plaintiffs decide that such remedy is best achieved by community control of schools rather than busing then that remedy is adequate. The recognition and judicial acknowledgment of the constitutional violation is important quite apart from the question of appropriate relief. While black parents may or may not view forced busing as a desirable solution, the judicial declara-

163. *See* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Bell, *Waiting on the Promise of* Brown, 39 L. & CONTEMP. PROBS. 341 (1975).

164. In at least two cases, district courts have approved plans that give black parents a larger measure of control over school policy-making and monetary resources in exchange for less integration than would otherwise have been ordered. In an Atlanta, Georgia case, the settlement plan called for the plaintiffs to give up their right to full desegregation of metropolitan Atlanta in return for a number of administrative positions including a black superintendent of schools. *See* Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga.), *aff'd*, 487 F.2d 680 (5th Cir. 1973).

In a Fort Worth, Texas case, the court approved a similar settlement allowing for the continuance of a predominantly black high school and middle school on a finding that black parents wanted to maintain a community school. *See* Flax v. Potts, No. 4205, at 21 (N.D. Tex. Aug. 23, 1973).

In Milliken v. Bradley, 97 S. Ct. 2749 (1977) (Milliken II), the Supreme Court upheld a district court order requiring that the Detroit Board of Education and the State of Michigan bear the costs of remedial or compensatory education programs including in-service training for teachers and administrators; guidance and counseling programs; and revised testing procedures. *Id.* at 2751. The Court rejected defendant's argument that, since the constitutional violation was unlawful segregation, the Court's decree must be limited to redressing that violation by pupil assignments. *Id.* at 2758.

tion of a wrong requiring redress surely gives the black community an additional asset in their negotiations with the powers that be.[165]

The *Milliken* majority's extensive discussion of the potential problems of inter-district relief would suggest that the Court's reluctance to recognize the full scope of the injury stems, in significant part, from its dissatisfaction with the proposed remedy. The Court has always balanced competing individual and societal interests when it determines the scope of relief.[166] But in *Milliken* the Court did much more than decide that the means chosen by the district court to redress the injury of segregation were not "reasonably available" or "feasible". The Supreme Court did not justify its reversal of the lower court simply because the proposed remedy would undermine "local control of schools";[167] it did so by denying the existence of any injury or constitutional violation outside of Detroit.[168]

The *Milliken* decision not only denied black children and their parents in Detroit the relief of inter-district busing, it denied them a judicial declaration which accurately described the full extent of their injury and thereby the political leverage which might have aided them in gaining more control of resources. Where the injury involved is one of defamation or stigmatization, there is an importance in official recognition and acknowledgment of that injury over and above the specific relief which attaches thereto. The individual whose reputation is injured by a false statement is to some extent made whole by the judicial finding and declaration of his having been wronged. This is especially important in the area of racial discrimination, for only when this country can bring itself to acknowledge the full extent of past and present racism will it accept the full moral responsibility of eliminating it.[169]

In 1974, civil rights advocates recognized that the Supreme Court's refusal to involve white suburbs in remedying northern school segregation marked a judicial retreat in the face of strong public opposition to forced bussing.

In retrospect, *Milliken* has proved to be even more disturbing in its implications. In *Pasadena, Austin* and *Dayton,* the Court,

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165. *See* Mays, *Comment: Atlanta—Living With* Brown *Twenty Years Later,* 3 BLACK L.J. 184 (1974).

166. *See, e.g.,* Milliken v. Bradley, 418 U.S. 717, 738 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

167. 418 U.S. at 741-44.

168. *Id.* at 745.

169. *See* notes 75 and 134 *supra.*

relying on *Milliken,* has not only refused to recognize the true nature and scope of the injury inflicted by segregation, but it has made apparent its disinclination to take cognizance of that truth by imposing upon plaintiffs the burden of proving particular constitutional violations where such violations clearly already exist.

## *Conclusion*

In 1857, the Supreme Court, in the infamous *Dred Scott* case,[171] placed its own imprimatur upon the governmental defamation of blacks in this country. While Chief Justice Taney's opinion is universally looked upon as a dark spot in the Court's history, it is extremely instructive in that it is also the Court's most candid and accurate explication of the social/political status of black people in the United States.[172]

Justice Taney's opinion is especially enlightening in the context of the present discussion because it demonstrates in no uncertain terms the Court's recognition of the fact that the "social" status and the "political" status of blacks in the several states were reflective of one another if not identical. The question before the Court was whether blacks, or the descendants of former slaves, were intended to be included within the meaning of the word "citizens" in the Constitution.[173] The Court's answer was that they were not, and to support that conclusion, Justice Taney turned to an exhaustive cataloguing of the inferior "social" position of blacks:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, *either in social or political relations;* and so far inferior, that they had no rights which the white man was bound to respect. . . . This opinion was at the time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted

170. *See generally* Amaker, *Milliken v. Bradley: The Meaning of the Constitution in School Desegregation Cases,* 2 HASTINGS CONST. L.Q. 349, 349-50 (1975).

171. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

172. Fredrick Douglass described Justice Taney's description of the position of blacks in the United States as "historical fact." F. DOUGLASS, LIFE AND TIMES OF FREDRICK DOUGLASS 293 (1962).

173. 60 U.S. (19 How.) at 403.

> upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.[174]

For Justice Taney, the indivisibility of the social and political status of blacks was so plain that he could use evidence of the former to prove the latter. Forty years later the *Plessy* Court denied the existence of that identity in holding that segregation had no political purpose or effect and was therefore no concern of the fourteenth amendment. Subsequently the Supreme Court has avoided the true meaning of that identity by finding segregation violative of the equal protection clause without directly refuting *Plessy's* separate but equal doctrine.

Justice Taney was prepared to recognize the intimate interrelationship between the social and political status of blacks because it served his purpose of proving that blacks were entirely without political status. But his analytical premise continues to be correct: that the intention of excluding blacks from the political process can be demonstrated by evidence of laws connoting social subservience. This is so because the clear and irrefutable purpose and effect of such laws is to secure the political subservience of blacks. Thus, until the Supreme Court understands and articulates this simple relationship, it will continue to misunderstand the nature of the injury which segregation inflicts upon blacks and the true basis of its inherent violation of the equal protection clause.

Because each of the Court's school desegregation decisions has resulted in the elimination of some manifestation of segregation, it may seem of little more than academic interest that the Court has made the right decisions for the wrong reasons. But in truth the matter has more far-reaching implications—for it is the failure of the Court to accurately identify the source of the injury inherent in segregated schools that has resulted in its erroneous distinction between *de facto* and *de jure* segregation as expressed in *Keyes v. School District No. 1*[175] and in the disastrous restrictions placed on the scope of relief in *Milliken* and its progeny.

It is incumbent upon those concerned with racial justice in this country to continue to confront the Court with an honest and uncompromising analysis of the institution of segregation as we press our causes before the bar. Until the Court is forced to recognize and

174. *Id.* at 407 (emphasis added).

175. 413 U.S. 189 (1973). *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

identify the true nature of the malignancy, the disease will prosper. Unfortunately, if history is at all indicative of what the future holds, segregation will continue to be "misunderstood" by the Supreme Court of the United States, despite our best efforts, until the nation's commitment to equality for blacks is as clear as was its commitment to white supremacy in 1857.